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NOTES.

HOME RULE PROVISION IN THE NEW YORK CONSTITUTION—THE SPECIAL FRANCHISE TAX DECISION.—That no generally accepted rule has yet been formulated by which to determine when the home rule provisions of the New York Constitution have been violated is shown by the recent decision on the Special Franchise Tax Law, in which four opinions were written, the conclusion of each being based on reasoning different from the reasoning of every other opinion, and also differing from the opinion of the referee before whom the case had first been argued. *The People ex rel. Metrop. St. Ry. Co.* v. *State Board of Tax Comm'rs* (1903) 80 N. Y. Supp. 85. The clause of the section in question reads: "All city, town and village officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages or some division thereof, or appointed by such authorities thereof as the Legislature shall designate for that purpose." Art. X, Sec. 2, N. Y. Const. 1894. This section, adopted word for word from the Constitution of 1846, replaces with slight modifications Art. IV, Sec. 15, Const. 1821, which replaced Art. XXIX, Sec. 15, Const. 1777. The latter reads: "The town clerks, supervisors, assessors, constables and collectors and all other officers hitherto eligible by the people, shall always continue to be so eligible, in the manner directed by the present or future acts of the Legislature."

By providing that local officers shall either be locally elected or appointed by local authorities it was the intention of the framers of the Constitution not to protect and perpetuate the offices themselves, but to secure to the locality the control of the functions and duties

of the local office. Accordingly it has been repeatedly held that the State could abolish a local office, provided that its functions were conferred on other officers locally elected or appointed. Able jurists have strongly contended, however, that in no case whatever could the Legislature take away from a local officer any of the powers existing in his office at the time of the adoption of the Constitution and invest State officers with similar powers. But it is now the settled law of this State that the Legislature can do this in certain cases. It was done as to police officers, *People* v. *Draper* (1857) 15 N. Y. 532; as to firemen, *People* v. *Pinckney* (1865) 32 N. Y. 377; as to health officers, *Board of Health* v. *Heister* (1868) 37 N. Y. 661; as to local officers having charge of street improvements, *Astor* v. *Mayor of New York* (1875) 62 N. Y. 567; as to commissioners of highways, *People ex rel. Kilmer* v. *McDonald* (1877) 69 N. Y. 362, as to boards of Supervisors in the erection of public buildings, *People ex rel. Comm'rs* v. *Supervisors of Oneida County* (1902) 170 N. Y. 105.

In the Special Franchise Tax cases the question was whether the State could take from local assessors the power of assessing certain property which previously had been assessed locally, and confer the duty upon State officers, together with the function of assessing other property for the first time declared taxable, Chap. 712 Laws of 1899. The Appellate Division held the act unconstitutional on the ground that the function of assessing property as a basis of taxation is exclusively and purely a local function; that the locality exercises this function as a matter of right, and therefore the Legislature has no power to interfere with its control. The court distinguished the cases in which acts investing State officers with functions previously exercised by local officers have been upheld, holding that in each of these cases the function was not exclusively local, but was delegated to the locality by the State, which still retained paramount authority over the exercise of the function. According to the decision the primary question in each case must be whether the object sought to be accomplished by the Legislature is of such a nature as to come within the scope of State power.

From the earliest colonial times none but local assessors have ever exercised the function of assessing property in New York. Duke's Laws; 1 Colonial Laws, p. 14; Nov. 1, 1683, Ibid, p. 131; June 19, 1703, Ibid, p. 540. Prior to the passage of the Special Franchise Tax Act only once has the Legislature interfered with the local power of assessment. By Chap. 410 Laws of 1867, the Legislature sought to transfer the duties of the Commissioners of Taxes and Assessments for the City of New York, who were officers appointed by local authorities to a board of five commissioners appointed by the Governor. In *People* v. *Raymond* (1868) 37 N. Y. 428 the Court of Appeals declared the Act unconstitutional.

The majority opinion in the principal case interprets the Raymond case as deciding that the function of assessing property for taxation is exclusively a local function. But the case in fact belongs to that large class of cases which hold that the State cannot directly or indirectly deprive the municipality of the appointment of local officers. *People* v. *Albertson* (1873) 55 N. Y. 50, *Rathbone* v. *Wirth* (1896) 150 N. Y. 459, *Matter of Brenner* (1902) 170 N. Y. 185. In the Ray-

mond case the question as to whether every function of the office was inviolate did not come up. The question is still an open one and must be finally decided by the Court of Appeals in the principal case.

Though the Legislature may, in the exercise of its paramount authority, create State officers to administer police duties previously performed by local officers, it cannot do so in matters of a purely local nature. *People* v. *Acton* (1867) 48 Barb. 524. In that case it was held that the Legislature had no power to invest State officers with the function of issuing licenses in respect to certain occupations which are entirely of local concern, *e. g.* theatres, junkshops, pawnshops, boarding houses. This decision seems in line with the rule laid down by the principal case that if the nature of the function is essentially local the State may not interfere in the control of the function which must be left to the municipality.

In *City of Syracuse* v. *Hubbard* (1901) 64 App. Div. 587 (appeal dismissed, 168 N. Y. 668) the question was whether auditors appointed by the State could legally audit certain claims against the city, incurred in excess of the charter, and which the Legislature (Chap. 402 Laws 1901) had directed the city to pay. The Court held the act constitutional on the ground that the claims to be audited were such as the local auditors never had authority to audit, although they had the general function of auditing. Similarly by the Special Franchise Tax Law certain intangible property, which local assessors never had power to assess, was declared taxable and the duty of assessing the new taxable property given to State officers. But while in *City of Syracuse* v. *Hubbard supra* the general functions of local auditors had been left unimpaired, in the principal case the power to assess certain tangible property which they had previously assessed had been taken from the local assessors, whose general functions were to that extent diminished. See, however, on this point the opinion of KENEFICK, J. in *Buffalo Gas Co* v. *Volz* (1900) 31 Misc. 160, where the constitutionality of this same Special Franchise Tax Law was upheld.

Judge Earl, referee, proposed a rule different from that of the Appellate Division to determine whether the home rule provision has been violated. Recognizing that the object of the section was to secure substantial home rule, rather than to protect any particular function, he declared the question in every case must be, "Has the Legislature taken away from officers elected or appointed in the locality any function essential to home rule? If it has, its acts must be condemned; if it has not, the act must stand." This rule, like that of the Appellate Division, is formulated after a consideration of all the authorities, and is not based on any particular decision or decisions, but rather is an individual interpretation of their general trend.

DEVISES TO CHARITABLE USES—WHAT IS A PUBLIC CHARITY?—Who may be the beneficiaries under a devise or gift to charitable uses? The element of the greatest difficulty in the definition of a charitable use is presented in the question whether the donor or devisor has directed his intention toward proper objects of charity. Said Sir WILLIAM GRANT in *Morice* v. *Bishop of Durham* (1804) 9 Ves. 405: "Those purposes are considered charitable which are enumerated in 43 Eliz. (1601) or which, by analogies, are deemed within its spirit